

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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RICHARD WINTERS, JOE CORONADO,  
RONNIE NICHOLSON, PETER YOGERST,  
WILLIAM PAYNE, COREY WISEMAN,  
NATHANIAL DUKES, AL CURTIS,  
EDWARD WILSON, RONALD McCAIN,  
PAUL PRICE, DANNY DAVIS,  
STANLEY FELTON, BRIAN CLARK,  
RUFUS LYNCH, DANNY WEBB,  
JAMES JACKSON, ROY BOATNER,  
JESSIE THOMAS, JIMMY McQUEEN,  
KEVIN VANCE, DEMITRIUS ROBERTSON,  
THOMAS JONES and ANTWAN TOWNSEND,  
Plaintiffs,

ORDER  
00-C-318-C

v.

CHARLES BLANCHETT, PERCY PITZER,  
OFFICER JOHN DOE #1, OFFICER JOHN DOE #2  
and OFFICER JOHN DOE #3,  
Defendants.

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This is a civil action for monetary, declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. Plaintiffs are presently confined at the Supermaximum Correctional Institution in Boscobel, Wisconsin but were confined at the Corrections Corporation of America-Whiteville Correctional Facility in Tennessee at all times relevant to the complaint.

In an order entered on June 12, 2000, I allowed plaintiffs to proceed on their claim of excessive force against defendants John Doe #1, John Doe #2 and John Doe #3; failure to protect from harm against defendants Jon E. Litscher, Charles Blanchett, Steven Schneider, Stephen Puckett and Percy Pitzer; and conditions of confinement against defendant Pitzer. I dismissed all other claims for failure to state a claim upon which relief may be granted. In an order entered on July 25, 2000, I dismissed defendants Litscher, Schneider and Puckett from this case on my own motion because of plaintiffs' failure to exhaust their administrative remedies against these defendants. In that order, I stayed a decision whether to allow plaintiffs to proceed on their claims against defendants Blanchett, Pitzer, John Doe #1, John Doe #2 and John Doe #3 until August 7, 2000, in order to allow plaintiffs additional time to submit proof that they had exhausted their administrative remedies against these defendants before filing their proposed complaint or provide an explanation for their failure to do so. In an order entered August 24, 2000, I allowed plaintiffs additional time to submit proof that they attempted to obtain inmate grievance forms from the Corrections Corporation of America-Whiteville Correctional Facility in Tennessee.

Presently before the court is plaintiffs' response to the order entered on August 24, 2000. (Although plaintiffs have titled their response a "motion for reconsideration," I construe plaintiffs' submission as a response to the order of August 24.) Also before the court are

plaintiffs' motions for appointment of counsel and for leave to proceed in forma pauperis for the purpose of requiring the U.S. Marshal to serve their complaint on defendants.

## I. ADMINISTRATIVE EXHAUSTION

Plaintiffs contend that they made several attempts to file complaints through the grievance procedure at CCA but that CCA officials refused to give them the proper grievance forms. Although plaintiffs failed to submit documentation that they attempted to obtain inmate grievance forms from CCA following their transfer to Supermax, I am not prepared to dismiss plaintiffs' claims for their failure to exhaust administrative remedies at this point in the litigation. If it is appropriate, defendants will be free to file a motion to dismiss challenging plaintiffs' satisfaction of the exhaustion requirement under 42 U.S.C. § 1997e(a).

## II. MOTION FOR APPOINTMENT OF COUNSEL

Plaintiffs have requested that counsel be appointed to assist them. In determining whether counsel should be appointed, I must first find that plaintiffs made reasonable efforts to retain counsel and were unsuccessful or that they were precluded effectively from making such efforts. See Jackson v. County of McLean, 953 F.2d 1070 (7th Cir. 1992). Plaintiffs must provide the court with the names and addresses of at

least three lawyers that they have asked to represent them in this case and who have declined to take the case before I can find that they have made reasonable efforts to secure counsel. Plaintiffs have failed to satisfy this requirement. However, even if they had satisfied this precondition to moving for appointed counsel, their motion would have to be denied. Because plaintiffs paid the fee for filing their complaint, it is not clear that they qualify for appointed counsel. In addition, appointment of counsel is appropriate where the plaintiffs appear to be incompetent to represent themselves given the complexity of the case, and where the presence of counsel would make a difference in the outcome of his lawsuit. See Zarnes v. Rhodes, 64 F.3d 285 (7th Cir. 1995) (citing Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993)). This case is simply too new to permit the court to assess plaintiffs' abilities or the potential outcome of the lawsuit. Moreover, it is likely that defendants will move to dismiss this case for improper venue or request that this case be transferred to the District Court for the Western District of Tennessee. Therefore, the motion will be denied without prejudice to plaintiffs' renewing it at some later stage of the proceedings.

### III. MOTION FOR IN FORMA PAUPERIS STATUS

As noted above, plaintiffs paid the full \$150 fee for filing their complaint. On August 28, 2000, plaintiff Peter Yogerst requested in forma pauperis status for the sole purpose of

serving defendants Blanchett and Percy with the complaint. Plaintiff Yogerst contends that defendant Blanchett refused service and that defendant Pitzer cannot be served because he was transferred to another CCA facility. Plaintiff's request will be denied because he has failed to submit a certified copy of his prison trust account statement or statements from the rest of the plaintiffs. Without proof that all of the plaintiffs qualify for indigent status, I cannot allow plaintiffs to proceed in forma pauperis for the purpose of requesting the U.S. Marshal to serve their complaint on defendants.

Plaintiffs should be aware that if they followed precisely Fed. R. Civ. P. 4(d) in attempting to gain defendant Blanchett's agreement to waive service of a summons, and if they allowed defendant Blanchett sufficient time to return the waiver as set out in Fed. R. Civ. P. 4(d)(2)(F), they may move the court for reimbursement from defendant Blanchett of the costs plaintiffs incur in effecting service on defendant Blanchett unless he shows good cause for his failure to accept service. Forms for seeking a waiver of service of the summons and instructions for serving defendants are enclosed to plaintiffs with this order. With respect to defendant Pitzer, plaintiffs assert that he cannot be served because he was transferred to another CCA facility. If plaintiffs are contending that they no longer know defendant Pitzer's address, it will not help them to have indigent status for the purpose of serving their complaint. It is plaintiffs' responsibility to supply the United States Marshals Service with the address at which a

defendant may be found. Therefore, if plaintiffs cannot learn informally where defendant Pitzer is, they will need to conduct formal discovery from another defendant to learn defendant Pitzer's whereabouts. Once they succeed in learning his address, there is no reason they cannot serve him with their complaint in the same manner they serve defendant Blanchett.

### ORDER

IT IS ORDERED that:

1. Plaintiffs' motion for appointment of counsel is DENIED without prejudice;
2. The stay on the decision whether to allow plaintiffs to proceed on their claims against defendants Charles Blanchett, Percy Pitzer, John Doe #1, John Doe #2 and John Doe #3 is LIFTED and plaintiffs may proceed on their claim of excessive force against the John Doe defendants, failure-to-protect against defendants Blanchett and Pitzer and conditions-of-confinement against defendant Pitzer; and
3. Plaintiffs' request for in forma pauperis status for the purpose of serving defendants with their complaint is DENIED. Enclosed with a copy of this order to plaintiff

Winters is a form explaining how plaintiffs are to serve defendants under Rule 4 of the Federal Rules of Civil Procedure and 2 sets of waiver of service of summons forms.

Entered this 7th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB  
District Judge